

EX PARTE OR LATE FILED

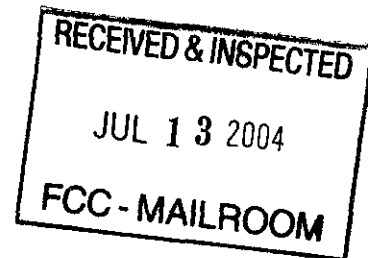
**Piper Rudnick**

1200 Nineteenth Street, N.W.  
Washington, D.C. 20036-2412  
main 202.861.3900 fax 202.223.2085

VINCENT M. PALADINI  
vincent.paladini@piperrudnick.com  
direct 202.861.3445

June 17, 2004

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554



Re: Ex Parte Submission  
In the Matter of Rules and Regulations Implementing the Telephone Consumer  
Protection Act of 1991, Report and Order, CG Docket No. 02-278

Dear Ms. Dortch:

On Wednesday June 16, 2004, G. Perry Wu, Litigation Counsel, Staples, Inc.; Mark D. Lefkow, Nall & Miller, LLP; E. Ashton Johnston, Piper Rudnick LLP and the undersigned, collectively representing Staples, Inc., met with K. Dane Snowden, Chief, Consumer & Government Affairs Bureau, Genaro Fullano, Richard D. Smith and Bryson Aldridge of the Consumer & Government Affairs Bureau, and Chris Killion of the Office of General Counsel, to discuss the pending Petition for Expedited Declaratory Ruling and for a Cease and Desist Order of Staples, Inc. and Quick Link Information Services, LLC, entered in the cited docket on May 3, 2004 (the "Petition"). The attached handout was distributed at the meeting and comprises the topics discussed during the meeting.

Please contact the undersigned if you have any questions or require additional information with regard to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be "V. Paladini", written over a horizontal line.

Vincent M. Paladini

/vmp  
Enclosure

cc: K. Dane Snowden  
Genaro Fullano  
Richard D. Smith  
Christopher Killion  
Bryson Aldridge

No. of Copies rec'd  
List ABCDE

0

FEDERAL COMMUNICATIONS COMMISSION  
CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU

PETITION FOR EXPEDITED DECLARATORY RULING  
AND FOR A CEASE AND DESIST ORDER  
FILED BY STAPLES, INC. AND  
QUICK LINK INFORMATION SERVICES, LLC  
*EX PARTE* MEETING

JUNE 16, 2004

## BACKGROUND

- On March 18, 2003, Mattison R. Verdery, C.P.A., P.C. ("Verdery") received a facsimile advertisement sent by Quick Link on behalf of Staples, advertising the availability of Staples' products.
- Verdery has acknowledged that at the time he received the facsimile, he and his business had an ongoing relationship with Staples, had provided a facsimile number to Staples, and had never severed the relationship with Staples.
- On July 23, 2003, Verdery, individually and as the purported representative of a nationwide class of customers of Staples, filed suit in the Superior Court of Richmond County, Georgia, seeking \$6.7 billion for alleged violations of the Telephone Consumer Protection Act. Among the claims was that the March 18, 2003 facsimile "constitutes an 'unsolicited advertisement,' as defined in the TCPA."
- Verdery's lawsuit also asserts that Commission Orders issued between 1992 and 2003, interpreting the TCPA as permitting businesses to send facsimiles to persons with whom they have an established business relationship, constitute "an improper attempt by the FCC to reinsert an exemption into the TCPA's ban on junk faxing that Congress specifically deleted."
- Verdery has asked the state court to disregard the Commission's *TCPA Orders* and to "find and declare that no such exemption exists."

## RELIEF REQUESTED

The Petitioners respectfully ask the Commission to –

- (1) declare that Verdery's challenge to the validity of the Commission's *TCPA Orders* lies with an appropriate federal Court of Appeals, not with a state court, and that Verdery has violated applicable law by collaterally attacking the *TCPA Orders* in state court;
- (2) clarify the TCPA rules and orders of the Commission that were in effect as of March 18, 2003;
- (3) declare that the Petitioners did not violate the TCPA or the Commission's rules and orders in effect on March 18, 2003; and
- (4) issue a cease and desist order enjoining Verdery from continuing its state court challenge to the validity of the *TCPA Orders*.

**A DECLARATORY RULING ADDRESSING VERDERY'S CHALLENGE TO THE  
VALIDITY OF FCC ORDERS WOULD NOT INTERFERE  
WITH THE STATE COURT'S LAWFUL JURISDICTION**

- The requested ruling takes into account the distinction between a state court private right of action “based on a violation of” the TCPA – which Section 227(b)(3) of the TCPA permits – and a state court challenge to the validity of the Commission’s interpretation of the TCPA – about which the TCPA is silent, but other federal law is crystal clear.
- The Communications Act and the Hobbs Act grant the federal courts of appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the Federal Communications Commission made reviewable by” Section 402(a) of the Communications Act. 28 U.S.C. § 2342; 47 U.S.C. § 402(a).
- Verdery has not cited *any* authority in support of its position that the state court has jurisdiction to entertain a challenge to the validity of Commission orders. Instead, Verdery contrives several arguments as to why the Commission should not consider Petitioners’ request.
  - Verdery’s primary argument is that the TCPA “grants a private right of action for violations of the junk fax prohibition exclusively in state court.” But there is no dispute among the parties on this point.
    - Petitioners are not asking the Commission to deprive the state court of its lawful jurisdiction under Section 227(b)(3). But Section 227(b)(3) did not confer upon any state court the authority to adopt rules and orders implementing the TCPA. The TCPA expressly granted that authority to the Commission.
    - There can be no plausible inference that the TCPA grants jurisdiction to state courts to determine the validity of the Commission’s implementing rules and orders. Congress long ago granted that authority to the federal Courts of Appeals: “Together, [Sections 402(a) and 2342] vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings.” *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9<sup>th</sup> Cir. 1996).

- Verdery wrongly interprets *Chevron* as supporting its claim that state courts may entertain challenges to the validity of Commission orders. *Chevron* involved a challenge to agency regulations, before the federal Court of Appeals, pursuant to a statutory provision similar to Section 402 of the Communications Act. *Chevron* must be read in conjunction with statutes giving Courts of Appeals jurisdiction over challenges to FCC rules. *Chevron* did not announce a controlling rule of law that henceforth *state* courts were free to find invalid final orders issued by the Commission at the conclusion of notice-and-comment rulemaking proceedings.
- The transcript of a recent hearing in the state court demonstrates the nature of Verdery's attack on the Commission's *TCPA Orders*:

The Court: "What authority does the FCC have to interpret a statute that's plain on its face?"

Mr. Lefkow [Counsel for Petitioners]: "That is a question of whether their action was outside their authority, Your Honor."

...

Mr. Revell [Counsel for Verdery]: "[T]here are plenty of Georgia cases, that if an administrative agency's interpretation is contrary to the plain meaning of the statute, the Court is to disregard it. The Court is to disregard it, not go back to the agency and say, [']did you mean what you said[?'].... The Court decides whether the agency's interpretation is valid and rational and reasonable and contrary to the plain meaning of the statute. That's what we've asked you to do. Here's the FCC pronouncement and interpretation. We think it conflicts with the TCPA. We're asking the Court to ignore that interpretation and the case books are full of instances where the Court does that.... The Supreme Court *Chevron* case being the – sort of the seminal case on that."<sup>1</sup>

...

Mr. Revell: "We're not regulated by the FCC. . . . we're not governed by the FCC."<sup>2</sup>

---

<sup>1</sup> Hearing on Motion for Reconsideration, Civil Action File No. 2003-RCCV-728, Superior Court of Richmond County, State of Georgia, May 17, 2004, Transcript at 71, 82-83.

<sup>2</sup> Id. at 68.

**THE COMMISSION SHOULD CLARIFY THE TCPA RULES AND ORDERS  
THAT WERE IN EFFECT AS OF MARCH 18, 2003**

- Verdery has asserted that uncertainty exists regarding the effect of the Commission's subsequent, different interpretation of the TCPA. At a recent hearing in the state court proceeding, the following exchange occurred:

The Court: "Well, as [Verdery] said [the FCC has] since gone back and said, [']wait a minute. We didn't know what were saying back then.['] [D]idn't they?"

Mr. Lefkow [counsel for Petitioners]: "They did not say they were wrong." ...

...

Mr. Brownstein [counsel for Verdery]: "[Y]ou asked counsel whether [the FCC was] wrong in [its] prior interpretation and he said they didn't, but they did say, [']we now reverse our prior conclusion[']. Now, that sort of sounds like [']we're wrong['] to me."<sup>3</sup>

- The Commission should clarify that its Orders interpreting the TCPA as permitting the sending of a facsimile advertisement to customers with whom the sender has an established business relationship were in effect on March 18, 2003, and that the Commission's subsequent, different interpretation has no retroactive effect.

**THE COMMISSION SHOULD DECLARE THAT THE PETITIONERS DID NOT VIOLATE THE TCPA  
OR THE COMMISSION'S RULES AND ORDERS IN EFFECT ON MARCH 18, 2003**

- There is no factual dispute about the nature of the business relationship between Verdery and Staples at the time Verdery received the facsimile at issue.
- The facts demonstrate that the Petitioners did not violate the TCPA or applicable Commission rules and orders.
- Because Verdery is, in effect, asking the state court to find that the Petitioners violated the TCPA under the Commission's revised, but not yet effective, interpretation of "unsolicited facsimile advertisement," the Commission is not constrained from issuing a ruling that addresses the state of the law as of the date Verdery actually received the facsimile at issue.



## **THE COMMISSION SHOULD ISSUE A CEASE AND DESIST ORDER**

- The Commission should issue a cease and desist order enjoining Verdery from challenging the validity of the Commission's orders.
- The FCC has authority to issue the requested order against any person who has "violated or failed to observe any of the provisions of this Act." 47 U.S.C. § 312(b)(1). There is no exception for violation or failure to observe 47 U.S.C. §§ 402 and 405, which provide for exclusive jurisdiction over the validity of Commission orders in the Commission and the federal courts of appeals. Action is needed to protect and effectuate the Commission's prior judgments, bringing this case within another exception to the Anti-Injunction Act.
- The Anti-Injunction Act, 28 U.S.C. § 2283, cited by Verdery in its Opposition, applies to federal courts, not agencies.